Supreme Court, U.S.
FILED

98 156 JUL 23 1998

OFFICE OF THE CLERK

No._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ROBERT MORRIS,
Petitioner,

V.

COOPER STEVEDORING COMPANY AND
INSURANCE COMPANY OF AMERICA,
Respondent.

**Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit err in failing to hear and address Petitioner's Appeal, Dismissing the matter for want of jurisdiction when his Petitioner for Review was filed within 60 days of the Order of the Benefits Review Board denying the Motion for Reconsideration.

2. Did the Fifth Circuit err in granting Respondent's Motion to Dismiss when Petitioner followed the procedures outlined and attached to the Order from the Benefits Review Board, and also followed the procedures set forth in the C.F.R. §802.407(a) with respect to perfecting his appeal from the Benefits Review Board to the U.S. Court of Appeals for the Fifth Circuit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to the Petition was not reported. The copies of the decision is reprinted in Appendix A hereto ("App. A") Page A-1.

The Order of the United States Court of Appeals for the Fifth Circuit denying Petitioner's Motion for Rehearing in April 27, 1998. It is reprinted in Appendix B hereto ("App.B") at page B-1.

JURISDICTION

Petitioner seeks review of the United States Court of Appeals for Fifth Circuit's decision filed on March 18, 1998. In that decision, the Fifth Circuit granted Respondent's Motion to Dismiss. Petitioner timely filed his Petitioner for Rehearing, and the Fifth Circuit denied Petitioner's Request for Rehearing on the April 27, 1998. Pursuant to Supreme Court rule 13.1, this Petition has been filed within 90 days of the entry of judgement.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUES AND CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Notice from the Clerk of the Benefits Review Board dated September 12, 1996 with Notice of Appeal Rights attached is reprinted in Appendix C hereto ("App.C") at page C1-C5.

Order of the Benefits Review Board dated October 22, 1996 denying the request for reconsideration (with Notice of Appeal Rights) is reprinted in Appendix D hereto ("App. D") at page D1-D5.

33 U.S.C. § 921, the text of which is reprinted in Appendix E hereto ("App.E") at page E1-E2.

20 C.F.R. §8-2.407 (e) is reprinted in Appendix F hereto (App.F") at page F-1.

I. STATEMENT OF THE CASE

Petitioner submits that a timely Motion for Reconsideration was filed with respect to the notice from the Clerk of the Benefits Review Board dated September 12, 1996. By Order of the Benefits Review Board issued on October 22, 1996, Petitioner's Motion for Reconsideration was denied by the Benefits Review Board. Thereafter, Petitioner/Claimant timely filed his Petition for Review to the U.S. Supreme Court of Appeals for the Fifth Circuit. The Petition was filed within 60 days of the Order of the Benefits Review Board denying the Motion for Reconsideration.

Respondent's filed a Motion to dismiss for Want of Jurisdiction and the Honorable Fifth Circuit Court of Appeals issued the Order of March 18, 1998 granting the Motion

Petitioner subsequently and timely filed his Petition for Rehearing with the Fifth Circuit Court of Appeals respectfully submitting to the Court that the Court erred and/or made a mistake with respect to the granting of Respondent's Motion to Dismiss. Along these lines, Petitioner stressed that he followed the procedures outlined and attached to the Order from the Benefits Review Board, and also followed the procedures of §802.407(a) with respect to perfecting his appeal to the Fifth Circuit Court of Appeals. The Fifth Circuit denied the Petition for Rehearing on April 27, 1998.

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II. ARGUMENT

A. The Fifth Circuit erred in failing to hear and address Petitioner's Appeal by dismissing the matter for want of jurisdiction when his Petition for Review was filed with 60 days of the Order of the Benefits Review Board denying the Motion for Reconsideration.

As previously indicated, Petitioner perfected his appeal to the Benefits Review Board and thereafter, on September 12, 1996 the Clerk of the Benefits Review Board and thereafter, on September 12, 1996 the Clerk of the Benefits Review Board issued a Notice of Public Law-104-134 (See Appendix C attached).

As per Appendix C, attached to the Notice from the Clerk was an outline of the procedures. As stated at the top of the page "Notice of Appeal Rights", which further states:

> "A Decision of the Benefits Review Board shall become final sixty (60) days after its issuance unless a written petition for review is filed with the appropriate United States Court of Appeals **prior** to the expiration of the sixty (60) day period, **or** unless a timely request for reconsideration if filed with the Board. 33 U.S.C. Section 921; 30 U.S.C. Section 932(a); 20 C.F.R. SECTIONS 802.406, 802.407. Therefore, you are advised that you may SEEK RECONSIDERATION OR, APPEAL, a final decision of the Board within the time limits set forth below. THE TIME LIMITS CANNOT BE EXTENDED, AND YOU MUST SUBMIT YOUR REQUEST TO THE PROPER PLACE WITHIN THE TIME PROVIDED.

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> "If you seek RECONSIDERATION by this Board (that is, if you want the Board to reconsider its decision), you must submit to the Board a written Motion for Reconsideration within **30 DAYS OF THE DATE STAMPED ON THE FRONT OF THIS DECISION**. Your motion should identify any error you find in the Board's opinion and state the reasons you believe warrant further consideration of your case. If you file a timely motion for reconsideration, you will have sixty (60) days from issuance of the Board's opinion and state the reasons you believe warrant further consideration of your case. If you file a timely motion for reconsideration, you will have sixty (60 days from the issuance of the Board's decision on reconsideration to file an appeal with a Court of Appeals, as set forth below.
>
> "Alternatively, if you wish to APPEAL to the United States Court of Appeals, you must insure that a petition for review is received by **THE APPROPRIATE COURT (NOT THIS BOARD) WITHIN SIXTY (60) DAYS OF THE DATE STAMPED ON THE FRONT OF THIS DECISION...**"

Petitioner followed the procedures as set forth in the Notice, and as per 20 C.F.R. § 802.407(a).

Thus, a timely Motion for Reconsideration of the Board's Order was made by Petitioner/Claimant herein. By Order issued on October 22, 1996, the Board acknowledged receipt of Claimant's Motion Requesting Reconsideration. The Order further denied the Motion and further stated that: "Further review of this determination, if desired, if properly sought by obtaining review with the appropriate U.S. Court of Appeals" (See # 16 in Supplemental record and as attached hereto).

Thereafter, on December 16, 1996 (within 60 days), Petitioner filed with the Fifth Circuit Court of Appeals a Petition for Review of the Benefits Review Board's Order. Such appeal was timely in accordance with the attachments to the Board's Order outlining the procedures for appeal, and was filed in accordance with and within the time limits as set forth by 20 C.F.R. 802.407(a), which states

> "(a) any party-in-interest may, within 30 days from the filing of the decision for non-interlocutory order by the Board pursuant to Section 802.403(b) request reconsideration of such decision by those members who rendered the decision..."

Again, Petitioner followed the procedures attached to the Order of the Board dated September 12, 1996 and followed the procedural rules with respect to the timely filing of a Motion for Reconsideration, and the timely filing of a Petition for Review in the U.S. Court of Appeals for the Fifth Circuit.

There was no mention in the Notice of the Clerk with respect to the Order of the Benefits Review of Board dated September 12, 1996 that indicated that Motions for Reconsiderations would not be entertained, or any such similar language. To the contrary, the attachment to the Notice specifically sets forth that Claimant could directly file his Notice of Appeal could be filed with the U.S. Court of Appeals or timely request a Reconsideration with this Board.

Again, according to the Notice of Appeal rights and as per 20 C.F.R. 802.407(a) a timely Motion for Reconsideration was filed with the Clerk of the Court. Thereafter, when the Motion for Reconsideration was denied, Petitioner timely filed his Petition for Review which was received by this Honorable Court prior to the expiration of

sixty days from the Order Denying his Request for Reconsideration, as allowed by law.

Thus, it is respectfully submitted that the Honorable United States Court of Appeals for the Fifth Circuit erred in failing to hear and address Petitioner's Appeal by granting Respondents' Motion to Dismiss, as Petitioner's Petition for Review was filed within sixty days (60) of the final order of the Benefits Review Board denying the Motion for Reconsideration and Petitioner followed the requisite procedures as indicated above.

III. CONCLUSION

The Court should accept review of the Fifth Circuit decision because the lower court erred in failing to hear and address Petitioner's Appeal as Petitioner clearly followed all of the proper appeal procedures resulting in the timely filing of his Petition for Review with the lower court.

Respectfully submitted this _____ day of July, 1998.

Respectfully submitted,
LAW OFFICE OF DENNIS L. BROWN

_____

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60854

U.S. Court of Appeals
FILED
MAR 18 1998
CHARLES R. FULBRUGE III
CLERK

ROBERT C MORRIS
Petitioner

v.

COOPER STEVEDORING COMPANY; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; INSURANCE COMPANY OF NORTH AMERICA
Respondents

Petition for Review of an Order of the
Benefits Review Board

Before DUHÉ, DeMOSS, and DENNIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that respondents' motion to dismiss appeal for lack of jurisdiction is GRANTED.

/s/ illegible

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60854

U.S. COURT OF APPEALS
FILED
APR 27 1998
CHARLES R. FULBRUGE III
CLERK

ROBERT C MORRIS
Petitioner

v.

COOPER STEVEDORING COMPANY; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; INSURANCE COMPANY OF NORTH AMERICA
Respondents

Petition for Review of an Order of the
Benefits Review Board

Before DUHÉ, DeMOSS, and DENNIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioner's motion for reconsideration of the court's March 18, 1998, order is DENIED.

/s/ illegible

APPENDIX C

U.S. DEPARTMENT OF LABOR
Benefits Review Board
900 K Street N.W.
Washington,D.C. 2001-8001

Re: Robert C. Morris v. Cooper Stevedoring Company, The Insurance Company of America (Case No. 83-LHCA-2933) (OWCP No. 08-0065149) (BRB No. 95-1161)

NOTICE FROM THE CLERK OF THE BENEFITS REVIEW BOARD

Pursuant to the provisions of Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996), enacted on April 16, 1996, appeals from decisions under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, which have been pending before the Benefits Review Board for more than one year, shall, if not acted upon before September 12, 1996, be considered affirmed by the Board and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal.

According to our records, the appeal in the instant case has now been pending at the Benefits Review Board for more than one year. Therefore, consistent with Public Law 104-134, this decision pending review by the Benefits Review Board is considered affirmed and shall be considered the final order of the Board for purposes of obtaining review in the United States courts of appeal. Attached please find an outline of the procedures for appealing to the courts of appeal.

DATE: SEP 12 1996

Sincerely

/s/ Thomas O. Shepherd, Jr./P.F.
Clerk of the Board

CERTIFICATE OF SERVICE

95-1161 Robert C. Morris v. Cooper Stevedoring Company, The Insurance Company of America (Case No. 83-LHCA-2933) (OWCP No. 08-0065149)

I certify that the parties below were served this day.

SEP 12 1996 /s/ Thomas O. Shepherd, Jr./P.F.
(DATE) Thomas O. Shepherd, Jr.
Clerk of the Board

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-Certified

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-Certified

Michael A. Varner, Esq.
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Ms Carol A. DeDeo,Esq.
Associate Solicitor
U.S. Department of Labor
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-Certified

Mr. Chris John Gleasman
District Director
OWCP-Longshore Division
2600 North Featherwood Drive
Suite 105
CHAMPIONS, TX 77034

Judge Everette E. Thomas
U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza Building
5th Floor
111 Veteran's Memorial Boulevard
METAIRIE, LA 70005

Judge Kerry Anzalone
U.S. Department of Labor
Office of Administrative Law Judges
111 Veterans Memorial Blvd
Suite 530
METAIRIE, LA 70005

NOTICE OF APPEAL RIGHTS

A Decision of the Benefits Review Board shall become final sixty (60) days after its issuance unless a written petition for review is filed with the appropriate United States Court of Appeals **prior** to the expiration of the sixty (60) day period, or unless a timely request for reconsideration is filed with the Board. 33 U.S.C. Section 921; 30 U.S.C. Section 932(a); 20 C.F.R. Sections 802.406, 802.407. Therefore, you are advised that you may SEEK RECONSIDERATION, **OR** APPEAL, a final decision of the Board within the time limits set forth below. THE TIME LIMITS CANNOT BE EXTENDED, AND YOU MUST SUBMIT YOUR REQUEST TO THE PROPER PLACE WITHIN THE TIME PROVIDED.

If you seek RECONSIDERATION by this Board (that is, if you want the Board to reconsider its decision), you must submit to the Board a written Motion of Reconsideration with **30 DAYS OF THE DATE STAMPED ON THE FRONT OF THIS DECISION.** Your motion should identify any error you find in the Board's opinion and state the reasons you believe warrant further consideration of your case. If you file a timely motion for reconsideration, you will have sixty (60) days from issuance of the Board's decision on reconsideration to file an appeal with a Court of Appeals, as set forth below.

Alternatively, if you wish to APPEAL to a United States Court of Appeals, you must insure that a petition for review is received by THE APPROPRIATE COURT (NOT THIS BOARD) WITHIN SIXTY (60) DAYS OF THE DATE STAMPED ON THE FRONT OF THIS DECISION. The petition for review should contain the case number and the date of the Board's decision. The petition should be sent to the Court of Appeals which covers the state in which the

employee's injury occurred. In a black lung claim, any state in which the miner had coal mine employment may be considered the state in which the injury occurred (i.e., for a black lung appeal, you may file in any Court of Appeals covering any state in which you **worked** as a miner). Listed on the back of this page are the twelve Courts of Appeals and the states they cover. You should identify the court covering the state of injury (including all states of mine employment for black lung claims) and file your petition with that court. If you have questions about your case, call the Clerk of the court at the number shown on the back of this page. If you appeal directly to the Court of Appeals you may not later get reconsideration by the Board. However, if you seek Board reconsideration you may later appeal the Board's ruling on reconsideration to the Court of Appeals.

IF YOU HAVE ANY QUESTIONS ABOUT THE PROCEDURES TO BE FOLLOWED IN YOUR CASE, CALL THE OFFICE OF THE CLERK OF THE BOARD, BENEFITS REVIEW BOARD, (202) 633-7503.

RECEIVED SEP 16 1996

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APPENDIX D

U.S. DEPARTMENT OF LABOR
Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 95-1161 OCT 25 1996
Case No. 83-LHC-2933
OWCP No. 8-65149

ROBERT C. MORRIS	)
	)
Claimant-Petitioner	)
v.	)
	) DATE ISSUED:
COOPER STEVEDORING	) OCT 22 1996
COMPANY	)
and	)
THE INSURANCE	)
COMPANY OF AMERICA	)
	)
Employer/Carrier-	)
Respondents	)

ORDER

The Board has received claimant's motion requesting reconsideration of the notice issued by the Board dated September 12, 1996, advising that as a result of Public Law 104-134 this claim is administratively affirmed.

Public Law 104-134, enacted April 26, 1996, provides that no funds made available by this Act may be used by the Secretary of Labor after September 12, 1996, to review a decision under the Longshore and Harbor Workers;

Compensation Act (33 U.S.C. §901, et seq.) that has been appealed and that has been pending before the Benefits Review Board for more than twelve (12) months.

In this request for reconsideration, claimant does not challenge the determination that as of September 12, 1996, this case had been appealed and had been pending before the Benefits Review Board for more than twelve (12) months. The Board, therefore, does not have authority to further review this case. Consequently, claimant's request for reconsideration is denied. Further review of this determination, if desired, is properly sought by obtaining review with the appropriate United States Court of Appeals.

By Order of the Board:

/s/ Thomas O. Shepherd, Jr. /MB
Thomas O. Shepherd, Jr.
Clerk of the Board

CERTIFICATE OF SERVICE

95-1161 Robert C. Morris v. Cooper Stevedoring Company, The Insurance Company of America (Case No. 83-LHCA-2933) (OWCP No. 08-0065149)

I certify that the parties below were served this day.

OCT 22 1996
DATE
Clerk of the Board /MHS

/s/ Thomas O. Shepherd, Jr.
Thomas O. Shepherd, Jr.

Michael N. Cokins,Esq.
5225 Allendale
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Judge Everette E. Thomas
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Judge Kerry Anzalone
U.S. Department of Labor
Office of Administrative Law Judges
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METAIRIE, LA 70005

NOTICE OF APPEAL RIGHTS

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If you seek RECONSIDERATION by this Board (that is, if you want the Board to reconsider its decision), you must submit to the Board a written Motion for Reconsideration within **30 DAYS OF THE DATE STAMPED ON THE FRONT OF THIS DECISION.** Your motion should identify any error you find in the Board's opinion and state the reasons you believe warrant further consideration of your case. If you file a timely motion for reconsideration, you will have sixty (60) days from issuance of the Board's decision on reconsideration to file an appeal with a Court of Appeals, as set forth below.

Alternatively, if you wish to APPEAL to a United States Court of Appeals, you must insure that a petition for review is received by **THE APPROPRIATE COURT (NOT THIS BOARD) WITHIN SIXTY (60) DAYS OF THE DATE STAMPED ON THE FRONT OF THIS DECISION.** The petition for review should contain the case number and the date of the Board's decision. The petition should be sent to the Court of Appeals which covers the state in which the

employee's injury occurred. In a black lung claim, any state in which the miner had coal mine employment may be considered the state in which the injury occurred (i.e., for a black lung appeal, you may file in any Court of Appeals covering any state in which you **worked** as a miner). Listed on the back of this page are the twelve Courts of Appeals and the states they cover. You should identify the court covering the state of injury (including all states of mine employment for black lung claims) and file your petition with that court. If you have questions about your case, call the clerk of the court at the number shown on the back of this page. If you appeal directly to the Court of Appeals you may not later get reconsideration by the Board. However, if you seek Board reconsideration you may later appeal the Board's ruling on reconsideration to the Court of Appeals.

IF YOU HAVE ANY QUESTIONS ABOUT THE PROCEDURES TO BE FOLLOWED IN YOUR CASE, CALL THE OFFICE OF THE CLERK OF THE BOARD, BENEFITS REVIEW BOARD, (202) 633-7503

RECEIVED SEP 16 1996

APPENDIX E

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injury or kill himself of another.

REVIEW OF COMPENSATION ORDER

Sec. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b)(1) There is hereby established a Benefits Review Board which shall be composed of *five* members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. *The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.*

(2) For the purpose of carrying out its functions under this Act, *three* members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least *three* members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of

employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the hearing examiner for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(5) *Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the powers which the Board may exercise. Each such panel shall have no more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a decision of a panel of the Board may within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panel's decision. Upon affirmative vote of the majority of the permanent members of the Board, the petition shall be granted. The Board shall amend its Rules of Practice to conform with this paragraph. Temporary members, while serving as members of the Board, shall be compensated at the same rate of compensation as regular members.*

(c) Any person adversely affected or aggrieved by a final

order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings, may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) If any employer of his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to

comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process mandatory or otherwise to enjoin upon such person and his officers and agents compliance with the order.

(e) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18.

APPEARANCE OF ATTORNEYS FOR SECRETARY, DEPUTY COMMISSIONER, ON BOARD

Sec. 21a. Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 21 or other provisions of this Act except for proceedings in the Supreme Court of the United States.